

<b>STATE OF COLORADO</b> <b>OFFICE OF ADMINISTRATIVE COURTS</b> 633 17 <sup>th</sup> Street, Suite 1300 Denver, Colorado 80202		
<b>KENT LAMBERT,</b> Complainant,  VS.  <b>RITTER INAUGURAL COMMITTEE, INC. and BILL RITTER FOR GOVERNOR,</b> Respondents.	▲ COURT USE ONLY ▲	
	<b>CASE NUMBER:</b>  <b>OS 20080010</b>	
<b>ORDER GRANTING MOTIONS TO DISMISS AND AGENCY DECISION</b>		

On April 21, 2008 Kent Lambert (Complainant) filed a complaint against the Ritter Inaugural Committee, Inc. (Inaugural Committee) and Bill Ritter for Governor (Candidate Committee), collectively "Respondents", with the Secretary of State (Secretary) alleging violations of Colorado's campaign finance laws. Complainant filed an amended complaint with the Secretary on April 22, 2008. On April 22, 2008, the Secretary referred the complaint to the Office of Administrative Courts (OAC) as required by Colo. Const. art. XXVIII, § 9(2)(a). The case was assigned to the undersigned Administrative Law Judge (ALJ). A status conference was scheduled on May 1, 2008 and a hearing was scheduled on May 7, 2008 in Denver, Colorado. Complainant was represented in this proceeding by Scott Gessler, Esq. The Inaugural Committee was represented by Michael D. Plachy, Esq. and Alex C. Myers, Esq. The Candidate Committee was represented by Mark G. Grueskin, Esq. and Theresa L. Corrada, Esq.

On May 1, 2007 Messrs. Gessler, Grueskin, and Plachy appeared by telephone for the status conference. During that conference, Respondents' counsel represented that they would be filing Motions to Dismiss the complaint and requested that the May 7 hearing date be vacated. The request to vacate the hearing was unopposed by Complainant's counsel. The ALJ granted the request to vacate the May 7 hearing and established a briefing schedule for receipt of motions, responses and reply briefs. See, May 2, 2008 Order Vacating Hearing and Procedural Order. Respondents filed their motions on May 1, 2008. Complainant filed his response on June 2, 2008. The Candidate Committee filed its reply on June 9, 2008. The Inaugural Committee requested a one-day extension to file its reply. The Inaugural Committee filed its reply on June 10, 2008. The ALJ grants the Inaugural Committee's request to file its reply brief on June 10, 2008.

### Nature of the Complaint

In his Amended Complaint (hereinafter “complaint”), Complainant alleges four separate counts of campaign finance violations. In support of the alleged violations, Complainant incorporates by reference Exhibit 1, which is the April 14, 2008 Report of Patten, MacPhee & Associates (Patten Report or report). The Patten Report is a document that was prepared by the firm of Patten, MacPhee & Associates, Inc. at the request of the Inaugural Committee for the purpose of reviewing the Inaugural Committee’s financial records to determine the extent to which its funds were used to pay the expenses of the Governor’s campaign committee (the Candidate Committee). Based on the information in the Patten Report Complainant filed a complaint against Respondents. Specifically, Complainant alleges that the Candidate Committee and Inaugural Committee violated campaign contribution limits, that the Candidate Committee failed to report all its non-monetary contributions, that the Inaugural Committee illegally contributed to the Candidate Committee, and that the Inaugural Committee failed to comply with registration and reporting obligations.

### Respondents’ Motions to Dismiss

On May 1, 2008 Respondents filed Motions to Dismiss. Respondents argue that Complainant’s complaint should be dismissed under C.R.C.P. 12(b)(5) because the complaint fails to state a claim upon which relief can be granted. In ruling on a Rule 12(b)(5) motion, the court is not permitted to make findings of fact, it must take the allegations of the complaint as true and draw all inferences in favor of the plaintiff. *Schwindt v. Hershey Food Corp.*, 81 P.3d 1144 (Colo. App. 2003). Whether a claim is stated must be determined solely from the complaint. And in passing on a motion to dismiss a complaint for failure to state a claim, the court must consider only those matters stated within the four corners thereof. *Kratzer v. Colo. Intergovernmental Risk Share Agency*, 18 P.3d 766 (Colo. App. 2000).

### First Claim for Relief (excess contributions)

In the First Claim for Relief, Complainant alleges that the Inaugural Committee violated Colorado’s contribution limits by contributing more than \$1,050 to the Candidate Committee during one election cycle (one primary plus one general election) and that the Candidate Committee violated the contribution limits by accepting excess contributions from the Inaugural Committee. Under Article XXVIII, § 3(1)(a)(I), no one person can make and no candidate committee can accept aggregate contributions for a primary or a general election excess of five hundred dollars to any one governor candidate committee for the primary election or for the general election (\$1,050 per election cycle).<sup>1</sup>

---

<sup>1</sup> Each limit on contribution described in subsections (1), (2), (3)(a), (3)(b), and (5) of Section 3 shall be adjusted by an amount based upon the percentage change over a four year period in the United States bureau of labor statistics consumer price index for Denver-Boulder-Greeley, all items, all consumers, or its successor index, rounded to the nearest lowest twenty-five dollars. The first adjustment shall be done

Accepting the allegations in the complaint and the incorporated report as true, between December 1, 2006 and August 15, 2007, the Inaugural Committee made 36 payments to various payees in the amount of \$217,164.56 for expenses directly related to the Governor's campaign. See, Exhibit G of the Patten Report. The amount of contributions made by the Inaugural Committee and accepted by the Candidate Committee during this period far exceed the contributions limits set forth in § 3(1)(a)(I); however, those claims must be dismissed because Complainant's complaint was not filed until April 21, 2008, which is 70 days beyond the time limit prescribed in Article XXVIII, § 9(2)(a).

Pursuant to § 9(2)(a) of Article XXVIII, a complaint filed with the Secretary must be filed no later than 180 days after the date of the alleged violation. Complainant's complaint was filed on April 21, 2008; one hundred and eight days prior to April 21, 2008 is October 24, 2007. None of the campaign contributions made by the Inaugural Committee to the Candidate Committee identified in Exhibit G of the report occurred on or after October 24, 2007.

In addition to the contributions identified in Exhibit G of the Patten Report, Exhibit H of that same report identifies 29 payments that were made by the Inaugural Committee to either Greg Kolomitz, the Governor's former campaign manager, or Solutions West Issues. The dates of the 29 payments in Exhibit H range from December 13, 2006 to October 24, 2007. Only 5 of the 29 payments in Exhibit H are related to the Governor's campaign expenses; the rest are attributable to inaugural activities.<sup>2</sup> And the only payment made by the Inaugural Committee within 180 days of the filing of the complaint was the single \$350 payment to Mr. Kolomitz on October 24, 2007. However, the October 24, 2007 payment is not one of the payments identified in Exhibit G as a contribution to the campaign.

In his complaint, Complainant generally avers that the October 24, 2007 payment was made to Mr. Kolomitz for campaign-related activities. Yet, none of the specific allegations in the complaint or the incorporated documents link or connect the October 24, 2007 payment with the campaign-related activities. In fact, the Patten Report excludes the October 24, 2007 payment as reimbursement for campaign expenses. In his response to the Motions to Dismiss, Complainant argues that his allegations are not limited solely to the evidence contained in the Patten Report and that in ruling on a 12(b)(5) motion, the ALJ must accept all of his allegations as true.

In ruling on a Rule 12(b)(5) motion, the court must take the allegations of the complaint as true and draw all inferences in favor of the plaintiff. *Schwindt*, supra. However, in this instance, Complainant has included in his complaint, by specific

---

in the first quarter of 2007 and then every four years thereafter. The Secretary shall calculate such an adjustment in each limit and specify the limits in rules promulgated in article 4. Pursuant to 8 CCR 1505-6, Rule 12.3 (Inflationary Adjustments to Contribution and Voluntary Spending Limits), as of the first quarter of 2007, the aggregate limits on contributions from any one person to a governor candidate committee for a primary or general election is \$525 (\$1,050 per election cycle).

<sup>2</sup> See, page 6 and Exhibit G of the Patten Report.

reference, the information contained in the Patten Report. The findings in the Patten Report and Complainant's general allegations about the nature of the October 24, 2007 payment are in conflict with one another. Complainant cannot have it both ways. He cannot incorporate the factual contents of the report into his complaint and later disavow the information contained therein. Under C.R.C.P. 12(b)(5), when ruling on a motion to dismiss, the trial court is not required to accept complainant's legal conclusions or factual claims at variance with the express terms of documents attached to the complaint. When documents are attached to a complaint, the legal effect of the documents is determined by their contents rather than by allegations in the complaint. Thus, the trial court need not consider the allegations of the complaint as true and in the light most favorable to plaintiffs, if such consideration would conflict with the attached documents. *Stauffer v. Stegemann*, 165 P.3d 713(Colo. App. 2006). Moreover, by way of analogy, in ruling on a motion for summary judgment, a genuine issue cannot be raised by counsel simply by means of argument. *Sullivan v. Davis*, 474 P.2d 218 (Colo. 1970). In this instance, the contents of the report do not support Complainant's general allegation that the October 24, 2007 payment was related to the Governor's campaign expenses.

Moreover, even if October 24, 2007 payment was related to a campaign expense, the \$350 payment, in and of itself, does not violate any contribution limit. In his response to the motions, Complainant argues that the \$350 payment should not be considered in isolation but should be added to the earlier contributions that fall outside the 180 day period of limitations since they all occurred within the same election cycle. The ALJ is not persuaded by this argument. The plain language of § 9(2)(a) bars violations that occurred prior to 180 days of the filing of a complaint. It does refer to election cycles or suspend the 180 day limit for violations occurring during election cycles. Adopting Complainant's election cycle theory would have the effect of rendering the 180-day time bar in § 9(2)(a) meaningless. Complainant also contends that reading § 9(2)(a) as barring the earlier contributions and considering only the single October 24, 2007 contribution, "would effectively raise the contribution limits for shrewd contributors who carefully time their contributions." (Response to Motions to Dismiss, page 7). Complainant may be correct; however, it is not the job of the ALJ to fill in gaps or eliminate loopholes in Colorado's campaign laws. *Common Sense Alliance v. Davidson*, 995 P.2d 748, 755 (Colo. 2000) (courts are not in a position to fill in gaps or eliminate loopholes in the voter-approved campaign laws.)

Viewing the complaint in the light most favorable to the Complainant and accepting the information in the incorporated report as true, the ALJ concludes that the October 24, 2007 payment to Mr. Kolomitz was not reimbursement for campaign-related activities by the Inaugural Committee and that all campaign-related expenses that were paid by the Inaugural Committee and accepted by the Candidate Committee in violation of Article XXVIII, § 3(1)(a)(I) occurred more than 180 days before the complaint was filed. Therefore Complainant's First Claim for Relief is dismissed as time barred.

### Second Claim for Relief (contributions from a corporation)

In his Second Claim for Relief, Complainant asserts that the Inaugural Committee violated Colorado's campaign laws by making contributions to a Candidate Committee. Under Article XXVIII, § 3(4), it is unlawful for a corporation to make a campaign contribution to a candidate committee, unless the corporation establishes a political committee or a small donor committee to accept contributions or dues from employees, officeholders, shareholders or members. The Inaugural Committee is a nonprofit Corporation that was formed for the purpose of soliciting funds for, planning and carrying out a number of inaugural celebration events across the State of Colorado immediately following the Governor's election. As a corporation, with no established political or small donor committee, the Inaugural Committee is prohibited from making contributions to the Candidate Committee.

Between December 1, 2006 and August 15, 2007 the Inaugural Committee did make contributions to the Candidate Committee. However, Complainant's Second Claim for Relief must be dismissed because it too is barred by the 180-day time limit in § 9(2)(a). Drawing all favorable inferences from the Complainant's complaint and the incorporated Patten Report, the last date the Inaugural Committee made a contribution to the Candidate Committee was August 15, 2007. One hundred and eighty days from August 15, 2007 is February 11, 2008. Complainant did not file his complaint until April 21, 2008, which is 70 days beyond the limitation period in § 9(2)(a).

### Third Claim for Relief (failure to file reports)

In his complaint, Complainant alleges that the Candidate Committee violated the reporting requirements in the Fair Campaign Practices Act (FCPA) by failing to report at least one non-monetary contribution it received between October 1, 2007 and December 31, 2007 in its January 15, 2008 report. In his Third Claim for Relief, Complainant does not identify with specificity the one non-monetary contribution to which he refers; however, inferring from the other allegations in his complaint, the ALJ assumes that Complainant is referring to the October 24, 2007 payment from the Inaugural Committee to Mr. Kolomitz. The ALJ has concluded that the October 24, 2007 payment to Mr. Kolomitz by the Inaugural Committee was not payment for campaign-related activities; therefore, the Candidate Committee had no obligation to report it as a campaign contribution in its January 15, 2008 report. Complainant's Third Claim for Relief is dismissed because there was no violation of the FCPA reporting requirements.

### Fourth Claim for Relief (failing to register as political committee and file reports)

In his Fourth Claim for Relief, Complainant alleges that the Inaugural Committee violated Colorado's campaign laws by failing to register as a political committee.<sup>3</sup> More

---

<sup>3</sup> Article XXVIII, § 2(12)(a) defines "political committee" as "any person, other than a natural person, or any group of two or more persons, including natural persons that have accepted or made contributions or

specifically, Complainant asserts that by making contributions to the Candidate Committee, the Inaugural Committee acted as a political committee and as such was required to register with the Secretary and file reports. The Inaugural Committee argues that other than his conclusory statement, Complainant does not assert any factual allegations in his complaint to support his claim that the Inaugural Committee is a political committee. Affording Complainant all reasonable inferences that the Inaugural Committee met the definition of a political committee, the claims relating to registration and reporting requirement violations are time barred.

All the contributions made by the Inaugural Committee to the Candidate Committee were made between December 1, 2006 and August 15, 2007.<sup>4</sup> The first payment was made on December 1, 2006. Under § 1-45-108(3), the committee would have been required to register prior to December 1, 2006 and its last contribution report would have been due on October 15, 2007 - the fifteenth calendar day following the end of applicable quarter in which a contribution was made. § 1-45-108(2)(a)(I)(A) and Rule 5.1. In order to prevail on his Fourth Claim for Relief, Complainant would have had to file his complaint by April 12, 2008; he did not. Accordingly, Complainant's Fourth Claim for Relief is dismissed as time barred.

### **AGENCY DECISION**

It is the Agency Decision of the ALJ that Complainant's Amended Complaint must be dismissed because all four counts for relief are time barred by the provisions of § 9(2)(a) in Article XXVIII of the Colorado Constitution. Therefore, the ALJ lacks jurisdiction to hear or consider any of the claims in Complainant's complaint.

### **Attorneys Fees**

Respondents' counsel request that the ALJ assess attorney fees against Complainant. Under § 1-45-111.5(2), C.R.S., which was amended by H.B. 08-1041 on April 10, 2008:

A party in any action brought to enforce the provisions of article XXVIII of the state constitution or of this article shall be entitled to the recovery of the party's reasonable attorney fees and costs from any attorney or party who has brought or defended the action, either in whole or in part, upon a determination by the office of administrative courts that the action, or any part thereof, lacked substantial justification or that the action, or any part thereof, was interposed for delay or harassment or if it finds that an attorney or party unnecessarily expanded the proceeding by other improper conduct, including, but not limited to, abuses of discovery procedures available under the Colorado rules of civil procedure.

---

expenditures in excess of \$200 to support or oppose the nomination or election of one or more candidates."

<sup>4</sup> As discussed above, the ALJ has concluded that the October 24, 2007 payment from the Inaugural Committee to Mr. Kolomitz was not for campaign-related activities.

Notwithstanding any other provisions of this subsection (2), no attorney fees may be awarded under this subsection (2) unless the court or administrative law judge, as applicable, has first considered the provisions of section 13-17-102(5) and (6). C.R.S. For purposes of this subsection (2), "lacked substantial justification" means substantially frivolous, substantially groundless, or substantially vexatious.

Under § 13-17-102, C.R.S.:

(4) The court shall assess attorney fees if, upon the motion of any party or the court itself, it finds that an attorney or party brought or defended an action, or any part thereof, that lacked substantial justification or that the action, or any part thereof, was interposed for delay or harassment or if it finds that an attorney or party unnecessarily expanded the proceeding by other improper conduct, including, but not limited to, abuses of discovery procedures available under the Colorado rules of civil procedure or a designation by a defending party under section 13-21-111.5 (3) that lacked substantial justification. As used in this article, "lacked substantial justification" means substantially frivolous, substantially groundless, or substantially vexatious.

(5) No attorney fees shall be assessed if, after filing suit, a voluntary dismissal is filed as to any claim or action within a reasonable time after the attorney or party filing the dismissal knew, or reasonably should have known, that he would not prevail on said claim or action.

(6) No party who is appearing without an attorney shall be assessed attorney fees unless the court finds that the party clearly knew or reasonably should have known that his action or defense, or any part thereof, was substantially frivolous, substantially groundless, or substantially vexatious; except that this subsection (6) shall not apply to situations in which an attorney licensed to practice law in this state is appearing without an attorney, in which case, he shall be held to the standards established for attorneys elsewhere in this article.

In the instant case, the ALJ finds that an award of attorney fees is warranted under § 1-45-111.5(2) on the basis that Complainant's complaint lacked substantial justification and that neither provision (5) nor (6) in § 13-17-102, C.R.S. apply. Both the Candidate and Inaugural Committees violated several provision of Colorado's campaign laws; however, the violations occurred more than 180 days prior to the filing of the complaint. That Complainant made several policy reasons why the claims should not be time barred, does not negate the fact that his entire complaint was time barred and substantially groundless. *Brown v. Silvern*, 141 P.3d 871, 875 (Colo. App. 2005) ("[a] claim or defense is groundless if the proponent's allegations, while sufficient to survive a motion to dismiss for failure to state a claim, are not supported by any credible evidence at trial.") Unlike the situation in *Brown*, Complainant's complaint was not sufficient to

survive a motion to dismiss for failure to state a claim upon which relief could be granted.

Respondents are granted 10 days from the date of this Order Granting Motions to Dismiss and Agency Decision to file documentation regarding their attorney fees and costs. Complainant may file a response to those submissions within 10 days of receipt thereof. The final order of the Administrative Law Judge pursuant to Colo. Const. art. XXVIII, § 9(2)(a) and § 24-4-106(11)(b), C.R.S. will be deemed to have been entered on the date the Administrative Law Judge rules on the matter of attorney fees and costs. The final order is subject to review with the Colorado Court of Appeals, pursuant to § 24-4-106(11), C.R.S. and Colo. Const. art. XXVIII, § 9(2)(a).

**DONE AND SIGNED** this \_\_\_\_ day of August, 2008.

---

MICHELLE A. NORCROSS  
Administrative Law Judge



**CERTIFICATE OF SERVICE**

I certify that I have served a true and correct copy of the above **ORDER GRANTING MOTIONS TO DISMISS AND AGENCY DECISION** by depositing same in the U.S. Mail, postage prepaid, at Denver, Colorado to:

Scott E. Gessler, Esq.  
Mario D. Nicolais, Esq  
1601 Blake St., Suite 310  
Denver, CO 80202

Mark G. Grueskin, Esq.  
Theresa L. Corrada, Esq.  
633 17<sup>th</sup> Street, Suite 2200  
Denver, CO 80202

Michael D. Plachy, Esq.  
Alex C. Myers, Esq.  
1200 Seventeen Street, Suite 3000  
Denver, CO 80202

William Hobbs  
Secretary of State's Office  
1700 Broadway, Suite 250  
Denver, CO 80290

On this on this \_\_\_\_ day of August, 2008.

\_\_\_\_\_  
Court Clerk